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No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON; DENNIS KELLY; G. PETER MOLLOY JR.; HEALTHMASTER, INC.; CHRISTOPHER GARRISON, individually and as Trustee for certain trusts; and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF ON THE MERITS OF RESPONDENTS JEANETTE G. GARRISON; HLM, INC. (F/K/A HEALTHMASTER, INC.); AND CHRISTOPHER GARRISON

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August 27, 1998

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QUESTION PRESENTED

Whether an employee at will who has not testified in, and was not a party to, a federal proceeding, but whose employment was terminated, has been injured in his "person or property" under 42 U.S.C. § 1985.

LIST OF PARTIES

The caption of the case contains the names of all parties. Respondent HLM, Inc. (f/k/a Healthmaster, Inc.) has no parent company, nonwholly owned subsidiaries, or affiliates to list pursuant to Rule 29.6.

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BRIEF ON THE MERITS OF RESPONDENTS JEANETTE G. GARRISON; HLM, INC. (F/K/A HEALTHMASTER, INC.); AND CHRISTOPHER GARRISON

STATEMENT OF THE CASE

Petitioner filed this action in the district court asserting one federal claim under 42 U.S.C. § 1985 and several state law claims against Jeanette Garrison; HLM, Inc. (f/k/a Healthmaster, Inc.) ("HLM"); Christopher Garrison, individually and as Trustee of certain trusts; and others. The district court dismissed Petitioner's Section 1985 claim based upon the binding authority of *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987). The district court also dismissed Petitioner's state law claims after declining to exercise supplemental jurisdiction over the state claims.[1] The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal on the authority of *Morast*.

The district court dismissed Petitioner's Section 1985 claim before any significant discovery took place and the district court did not consider any evidence outside of the pleadings when ruling on the motions to dismiss. Accordingly, the relevant facts for purpose of

[1] Petitioner did not appeal the dismissal of the state law claims. Petitioner refiled his state law claims in a state court action captioned *Haddle v. Garrison, et al.*, Civil Action File No. 96-RCCV-572 (Superior Court of Richmond County, Georgia). The Richmond County Superior Court subsequently granted summary judgment to all defendants on all claims asserted by Petitioner, and the Georgia Court of Appeals affirmed the grant of summary judgment.

Respondents' motions to dismiss are contained in Petitioner's Complaint.[2]

From September 22, 1986, until approximately April 13, 1995, Petitioner was an employee of HLM. (App. 8, ¶ 7.) On March 8, 1995, HLM and others were indicted in the United States District Court for the Southern District of Georgia. (App. 9, ¶ 12.) In April 1995, Healthmaster Home Health Care, Inc. ("HHHC"), the wholly-owned operating subsidiary of HLM, filed for protection under Chapter 11 of the bankruptcy code. In connection with the bankruptcy proceeding, most of the employees of HLM, including Petitioner, were transferred to HHHC. (App. 8-9, ¶¶ 8-9.) The bankruptcy court appointed a trustee to oversee the affairs of HHHC. *Id.*

During the investigation that led up to the indictment of HLM and others, and the subsequent bankruptcy filing, Petitioner alleges he cooperated with federal agents. While Petitioner at one point alleges he "testified pursuant to subpoena before said grand jury," Petitioner later admits "his testimony was not actually taken due to the press of time." (App. 9, ¶ 14.) Petitioner does not allege he was a party to the criminal case brought against HLM and others, or any other federal proceeding; he only alleges he was to be a potential witness in the criminal case against others. (App. 10, ¶16.)

[2] Petitioner amended his Complaint to assert an additional state law claim which is not at issue in this appeal.

On June 21, 1995, the President of HHHC, Respondent G. Peter Molloy, terminated Petitioner's employment with HHHC. *Id.* Petitioner alleged that Mr. Molloy terminated Petitioner's employment as a part of a conspiracy with Respondents Jeanette Garrison, Dennis Kelly and H.M.[3] in retaliation for Petitioner's cooperation with federal agents. (App. 10, ¶ 18.] Petitioner does not allege that he was threatened with force or violence by any of Respondents or that the government ever investigated or charged any of Respondents with obstruction of justice.

Although the holdings of the district court and the court of appeals properly were based on allegations in Petitioner's Complaint, Petitioner improperly includes numerous factual allegations in his brief that are not part of the record and were not considered by the district court or the court of appeals in their rulings on the motions to dismiss. In particular, Petitioner references testimony by Robert Pittard and testimony and rulings in the case of *O'Neal v. Master Health Plan, Inc.*, No. 96-028 (S.D. Ga.) (Petitioner's Brief on the Merits (hereinafter Petitioner's Brief) at 5-6). The Pittard affidavit was not considered by the district court in addressing Respondents' motions to dismiss[4] and the *O'Neal* citations are not part of the

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[3] Christopher Garrison, individually and as trustee for certain trusts, is not named as a defendant in Petitioner's Section 1985 claim. Christopher Garrison was only named as a defendant in a single state law claim.

[4] In Petitioner's attempt to prejudice the Court with extraneous allegations, Petitioner conveniently omits that Mr. Pittard

record. This Court has repeatedly held that parties may only rely on, and the Court may only consider, information that is part of the record. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) ("[T]his Court must affirm or reverse upon the case as it appears on the record . . .."); *In re New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.16 (1970) ("could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case.").[5] Moreover, the testimony and rulings from *O'Neal* are not relevant in this case. The only party against which the plaintiff in *O'Neal* obtained a verdict was Master Health Plan, Inc. ("MHP"), which is *not* a party to this case. Petitioner did not allege that MHP was in any way involved in the termination of Petitioner's employment.

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previously testified under oath contrary to the allegations in Petitioner's Brief and that Mr. Pittard only changed his sworn testimony after he was caught embezzling funds by several of the Respondents.

[5] The cases cited by Petitioner in support of his claim that the Court may take judicial notice of matters in the public record misstates the holdings of the cases. (Petitioner's Brief at 5.) The cases actually hold that a district court may take judicial notice of matters in the public record and if the matters are made part of the record on appeal, then the appellate court may consider such matters. The district court did not take judicial notice of the testimony and rulings in *O'Neal* referred to by Petitioner.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the termination of Petitioner's employment was not a cognizable injury to "person or property" under 42 U.S.C. § 1985. Petitioner was an at will employee and, therefore, had no protected property interest in his employment.

Congress passed Section 1985 following the Civil War along with several other civil rights enactments, including the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1982, and 1983. Section 1983 provides a mechanism for enforcing the prohibition against deprivation of property without due process of law under the Fourteenth Amendment. This Court has repeatedly held that at will employment is *not* a protected property interest under the Due Process Clause. Similarly, courts have held that the protection of "property" under Section 1982 does *not* encompass at will employment. Finally, this Court and Congress have recognized the protection against employment related discrimination under the "make and enforce contracts" clause of Section 1981, but have not found such protection under Section 1981's "persons and property" clause.

Section 1985 does not contain any language related to employment. There is also no reference in the legislative history of the statute to any prohibition against the termination of at will employment. This absence of any reference to employment in the statute and legislative history is consistent with property and employment rights

at the time of passage of Section 1985. Decisions by this Court and other courts both before and after the enactment of Section 1985 demonstrate there was not a recognized property right in at will employment. Moreover, Congress uses explicit terms when limiting an employer's right to terminate at will employment as demonstrated by the numerous anti-discrimination statutes passed by Congress approximately 100 years after the enactment of Section 1985.

Petitioner and *amici curiae* misstate the ramifications of Petitioner not having a cause of action under Section 1982. Employees that actually have their employment terminated in retaliation for testimony in a federal proceeding are protected by alternative civil remedies and criminal statutes prohibiting such actions by employers. The significant incarceration and fines faced by employers that obstruct justice or tamper with witnesses provide more deterrence to employers than a Section 1985 claim.

Petitioner's claim was also properly dismissed on alternative bases. Although Petitioner attempts to selectively rely on decisions from other circuits, the other circuits would have also dismissed Petitioner's claim because he was not a party to a federal proceeding and there is no allegation that Petitioner was inhibited in his testimony. Finally, Petitioner failed to adequately plead force, intimidation or threat to support his retaliation claim.

ARGUMENT

I. INTRODUCTION

This case is an effort to accomplish that which this Court repeatedly has stated it will avoid – converting the reconstruction-era civil rights acts into a general federal tort law. With specific reference to 42 U.S.C. § 1985(3) this Court has held:

> That [Section 1985(3)] was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, that Congress has a right to punish an assault and battery when committed by two or more persons within a State.

Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971). More recently, this Court has stated that a plaintiff's "definitional ploy" should not be allowed to "convert [Section 1985(3)] into [a] 'general federal tort law' . . .." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993). *See also, Paul v. Davis*, 424 U.S. 693, 701 (1976) ("We have noted the 'constitutional shoals' that

confront any attempt to derive from congressional civil rights statutes a body of general federal tort law.").

A proper construction of Section 1985 will avoid that pitfall, and will result in the affirmance of the district court and court of appeals. An expansive interpretation of Section 1985, as urged by Petitioner and *amici curiae*, will in substance result in this Court creating a new body of federal wrongful termination of employment remedies. Respondents urge the Court to exercise judicial restraint and affirm the decisions below.

II. PETITIONER WAS NOT INJURED IN HIS PERSON OR PROPERTY AS A RESULT OF THE TERMINATION OF HIS AT WILL EMPLOYMENT.

The statute under which Petitioner brings his claim, 42 U.S.C. § 1985, has as an essential element that a party be "injured in his person or property." 42 U.S.C. §§ 1985(2) and (3). Although this Court has not yet addressed the limits of injury to "person or property" under Section 1985, it has been held with respect to other civil rights enactments passed contemporaneously with Section 1985 that "property" does not encompass termination of at will employment. Expanding the definition of "property" under Section 1985 to encompass termination of at will employment would not only be inconsistent with the interpretation of the other contemporaneous civil rights enactments, it would be inconsistent with the legislative history of Section 1985

and Congress' understanding of employment rights at the time Section 1985 was enacted.

A. The Reconstruction-Era Civil Rights Enactments That Include References To Property Have Not Been Interpreted To Encompass At Will Employment.

1. History of the Relevant Enactments

Before the Court is the task of interpreting language in provisions of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act) which are now codified in Sections 1985(2) and (3). Although this Court has interpreted other facets of these provisions, it has not addressed the question of what constitutes legally cognizable damages. *See, e.g., Kush v. Rutledge*, 460 U.S. 719, 724 n.5 (1983) ("Our limited grant of certiorari does not encompass the question whether the alleged conspiracy to interfere with witnesses gave rise to any recoverable damages.").

The question presented, although phrased in different iterations by Petitioner and *amici curiae*, is whether the termination of an individual's employment at will is injury to "person or property" within the meaning of the Civil Rights Act of 1871. Petitioner and *amici curiae* have ranged far and wide in their efforts to present to the Court a definition of "property" that encompasses employment at will. Completely absent from their

presentations though, is any discussion of the interpretation of the term "property" as it was used in the reconstruction-era amendments to the United States Constitution and the civil rights legislation enacted pursuant to the amendments (which includes the Civil Rights Act of 1871).

The ratification of the Thirteenth Amendment to the United States Constitution, which abolished the institution of slavery, was officially certified on December 18, 1865. Less than a month later the bill that ultimately became the Civil Rights Act of 1866 was introduced. The legislative history of the Civil Rights Act of 1866 shows the bill was intended to give statutory effect to the Thirteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431-32 (1968).

The joint resolution ultimately adopted as the Fourteenth Amendment to the United States Constitution passed in the same session of Congress. As described by this Court:

> Frequent references to the Civil Rights Act [of 1866] are to be found in the record of the legislative debates on the adoption of the [Fourteenth] Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of

> Congress in supporting adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land.

Hurd v. Hodge, 334 U.S. 24, 32 (1948). The ratification of the Fourteenth Amendment, which allowed the former slaves to become citizens and made it illegal for states to deprive citizens of due process of law or to deny equal protection of the law, was certified in July 1868.

The Fifteenth Amendment to the United States Constitution, which secured to former slaves the right to vote, was proposed in February 1869. The amendment was ratified in February 1870. *United States v. Price*, 383 U.S. 787, 804-05 (1966).

On the heels of the ratification of the Fifteenth Amendment was the enactment of the Civil Rights Act of 1870 (also known as the Enforcement Act). The Civil Rights Act of 1870 prohibited actions by the states and individuals to impede a person's ability to exercise the right of suffrage and conspiracies by individuals to intimidate from, or retaliate against a person for, exercising the rights or privileges provided by the Constitution or federal law. Section 18 of the Civil Rights Act of 1870 also re-enacted, with minor changes, the Civil Rights Act of 1866. *See, Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

The Civil Rights Act of 1871 was among the last of the reconstruction legislation. *Collins v. Hardyman*, 341 U.S. 651, 656 (1951). The 1871 Act was derived in part from the Civil Rights Act of 1866, and was enacted for the purpose of enforcing the Fourteenth Amendment. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545 (1972). As originally enacted, the Civil Rights Act of 1871 provided both criminal and civil actions against persons who conspired to violate a person's federally guaranteed rights. The criminal provisions were subsequently declared unconstitutional and were repealed. *United States v. Harris*, 106 U.S. 629 (1883); *see Gill v. Farm Bureau Life Ins. Co. of Missouri*, 906 F.2d 1265, 1268 n.17 (8th Cir. 1990). The civil remedy rarely was invoked. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 370-71 (1979).

After various recodifications, the key provisions of the Civil Rights Acts of 1866, 1870, and 1871 now are codified in 42 U.S.C. §§ 1981, 1982, 1983 and 1985. Sections 1981 and 1982 have their genesis in the Civil Rights Act of 1866, re-enacted in the Civil Rights Act of 1870. *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). The parent of Sections 1983 and 1985 is the Civil Rights Act of 1871. *Griffin v. Breckenridge*, 403 U.S. 88, 98-99 (1971). As discussed above, each of these statutes has its constitutional foundation in the reconstruction-era amendments, including the Fourteenth Amendment.

The term "property" is used in the Fourteenth Amendment and in Sections 1981, 1982 and 1985. There

is a substantial body of jurisprudence interpreting what is meant by "property" in the amendment and in the statutes.[6] This body of jurisprudence, interpreting a constitutional amendment and the legislation contemporaneously therewith enacted to enforce the rights established by the Amendment, shows that employment at will is not "property" within their meaning. Further, the language used in this interrelated body of law evidences "property" was not meant to encompass employment at will.

2. The Fourteenth Amendment and 42 U.S.C. § 1983

The Fourteenth Amendment provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law . . .." U.S. Const. amend. XIV, § 1. The remedy for deprivation of property under the Fourteenth Amendment is found in Section 1983. *Paul v. Davis*, 424 U.S. 693, 699-701 (1976). That statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the

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[6] While Section 1983 does not contain the term "property," it has been used on innumerable occasions to seek redress for deprivation of "property" against persons acting under color of state law.

> Constitution and laws, shall be liable to the party injured . . ..

42 U.S.C. § 1983.

The constitutional right to the procedural safeguard of due process is not relevant here. What is relevant is what is meant by the term "property" as used in the Fourteenth Amendment, which is a part of the overall package of reconstruction-era civil rights protections. The term "property" as used in the Fourteenth Amendment does not have a specialized or limited meaning. This Court has declared:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims for entitlement to those benefits.
>
> * * *
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *see also, Leis v. Flynt*, 439 U.S. 438, 441 (1979) ("As this Court has observed on numerous occasions, the Constitution does not create property interests.").

This Court squarely addressed whether at will employment constituted "property" within the meaning of the Fourteenth Amendment in *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, a former police officer brought an action alleging that the termination of his employment without a hearing was a violation of due process. *Id.* at 344-45. Consistent with *Roth*, this Court recognized:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.

Id. at 344. This Court accepted the lower court's determination that under state law the employee was an employee at will. Having made that determination, this Court held:

> In this case, a holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had *no* property interest.

Id. at 345 n.8.

It is undisputed in this case that Petitioner's employment was as an employee at will. Thus, his employment would not be "property" within the meaning of the Fourteenth Amendment.

3. 42 U.S.C. § 1981

The provision of the reconstruction-era civil rights acts now codified at 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property . . ..

Section 1981 has been held by this Court to provide a remedy against discrimination on account of race in private employment:

> Title 42 U.S.C. § 1981, being the present codification of § 16 of the century-old Civil Rights Act of 1870 . . . on its face relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the federal Courts of Appeals – and we now join them – that § 1981 affords a federal remedy

> against discrimination in private employment on the basis of race.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

It is *not* important to this case that this Court recognized a private right of action for race discrimination in employment under Section 1981. It *is* important that the right of action was found by this Court in the clause of Section 1981 relating to the making and enforcing of contracts. The right of action was *not* found in that portion of Section 1981 that provides for "the full and equal benefit of all laws and proceedings for the security of persons and property."

That the foundation for a private right of action under Section 1981 involving employment was found in the "make and enforce contracts" portion of Section 1981 was discussed at length by the majority and those Justices who concurred in part and dissented in part in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, this Court decided that racial harassment in employment was not covered by Section 1981, finding that racial harassment in employment did not involve either the refusal to make a contract or the plaintiff's ability to enforce her employment contract. The racial harassment was found to be "postformation conduct by the employer relating to the terms and conditions of continuing employment." *Id.* at 179.

Were employment rights encompassed by "persons or property," as contended by Petitioner and *amici curiae*, this Court would not have needed to reach the decision it did in *Patterson*. This Court simply could have looked past the "make and enforce contracts" provision of Section 1981 and found that in order to have "the full and equal benefit of all laws and proceedings for the security of persons and property," racial harassment in employment was prohibited by Section 1981.

Congressional intent that employment is covered under the "make and enforce contracts" clause of Section 1981, and not the "persons and property" clause, is evidenced by the 1991 amendment to Section 1981. In direct response to *Patterson*, Congress added a definition of "make and enforce contracts" to include:

> [T]he making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § 1981(b); s*ee Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304-08 (1994).

Thus, the cases interpreting Section 1981, and Congress' actions in amending Section 1981, evidence that the term "property," as used in the reconstruction-era civil rights acts, does not include at will employment.

4. 42 U.S.C. § 1982

The caption of 42 U.S.C. § 1982 is "Property rights of citizens." The statute provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Respondents recognize that Section 1982 contains the modifiers "real and personal" before the word "property." This Court, though, has stated that:

> To effectuate the remedial purposes of the statute, the Court has broadly construed this language [Section 1982] to protect not merely the enforceability of property interests acquired by black citizens but also their right to acquire and use property on an equal basis with white citizens.

City of Memphis v. Greene, 451 U.S. 100, 120 (1981). In *Greene*, this Court provided several examples of the expansive interpretation given to the term "property." *Id.* at 121-22, including n.35.

Despite this broad construction of the term property in Section 1982, without exception, courts have held that Section 1982 does *not* encompass termination of

employment. *See, e.g., Schirmer v. Eastman Kodak Co.*, No. 86-3533, 1987 WL 9280 *3-4 (E.D. Pa. April 9, 1987), *aff'd*, 869 F.2d 591 (3d Cir. 1989); *Jurado v. Eleven-Fifty Corp.*, 630 F. Supp. 569, 572 (C.D. Cal. 1985), *aff'd*, 813 F.2d 1406 (9th Cir. 1987); *Abel v. Bonfanti*, 625 F. Supp. 263, 269 (S.D.N.Y. 1985); *Tate v. Hills-McCanna Co.*, 42 Fair Empl. Prac. Cas. (BNA) 138, 1932 WL 361 (N.D. Ill. June 16, 1982); *Johnson v. Duval County Teacher's Credit Union*, 507 F. Supp. 307, 310 (M.D. Fla. 1980). The courts found the plaintiffs did not have a "property" interest in their employment. *See, e.g., Schirmer*, 1987 WL 9280 *4 ("employment rights are not 'property'"); *Abel*, 625 F. Supp. at 269 (property interest in continued employment has not been recognized as protected by Section 1982); *Tate*, 1982 WL 361 *1 ("employment relationship does not implicate any of the concerns of section 1982").

Thus, it is evident that courts interpreting this provision of the reconstruction-era civil rights acts have not been willing to stretch the meaning of property so far as to encompass employment at will.

5. 42 U.S.C. § 1985

The relevant provisions of 42 U.S.C. §§ 1985(2)-(3) are as follows:

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness

in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of having so attended or testified . . ..

(3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property . . . the party so injured . . . may have an action for the recovery of damages . . ..

This Court has held that Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). While the majority of this Court in *Novotny* found it unnecessary to reach the question of "whether § 1985(3) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution," *id.* at 370 n.6, Justice Powell, while concurring, stated:

> I would take advantage of the present opportunity to make clear that this Civil Rights Era statute was intended to provide a remedy *only* for conspiracies to violate

> fundamental rights derived from the Constitution.

Id. at 381 n.*. Justice Powell also noted that "this Court has never held that the right to any particular private employment is a 'right of national citizenship' or derives from any other right created by the Constitution." *Id.* at 381.

With this context we can turn to the question of what constitutes injury to person or property within the meaning of Section 1985.

Termination of an at will contractual relationship has been held not to be injury to person or property within Section 1985. In *Gill v. Farm Bureau Life Ins. Co. of Missouri*, 906 F.2d 1265 (8th Cir. 1990), the plaintiff brought a claim under Section 1985 based upon the termination of his at will agency relationship with the defendant insurance company. Rejecting the plaintiff's claim, the Eighth Circuit held:

> The colorfully sinister words at the beginning of § 1985(c) itself convey the picture of nightriders who "go in disguise upon the public highway or upon the premises of another" to commit their violent misdeeds. The victim "injured in his person or property" was surely contemplated by Congressmen in 1871 as suffering something more severe than loss of

> commissions as an insurance agent. Indeed, such loss in [plaintiff's] case was damnum sine injuria, for [plaintiff's] contracts themselves contained express provisions permitting cancellation upon written notice.

Id. at 1269-70.

Two circuits have held that employment at will does not constitute property within the meaning of Section 1985. The first was the Eleventh Circuit in *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987). While the Eleventh Circuit opinion in *Morast* does not specifically refer to "property," a review of the district court opinion evidences that the Eleventh Circuit was referring to "property" when it found no injury. The district court opinion states:

> Finally, the allegation that plaintiff was injured in his "person or property," cannot stand. The function of a conspiracy action for a violation of civil rights is compensatory. The plaintiff must have suffered an actual injury to make out a cause of action. For reasons that shall be discussed later, plaintiff, as an at-will employee, had no constitutionally cognizable property interest in his job. Therefore his only complained of injury, his loss of employment, cannot suffice to state a claim under this statute.

Morast v. Lance, 631 F. Supp. 474, 479 (N.D. Ga. 1986).

The Seventh Circuit in *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991) reached the same conclusion. While considering the plaintiffs' claims under 42 U.S.C. § 1983 for violation of the Fourteenth Amendment Due Process Clause, the Seventh Circuit held the plaintiffs had failed to show a protected property interest in their employment. Having found employment at will was not property within the meaning of the Fourteenth Amendment, the court also concluded there was no injury to property under Section 1985. *Id.* at 468-69; *see also, Lim v. Central DuPage Hosp.*, 871 F.2d 644, 646, (7th Cir. 1989) ("[t]he parties have agreed that 'property' means the same in [Section 1981, 1982 and 1985] as in section 1983, and we need not go behind this stipulation.").

The circuit court cases relied upon by Petitioner to support the proposition that at will employment is "property" within the meaning of Section 1985 are not based upon any legal authority. The first of the cases, *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983), merely declares, without citation, that: "'Property' here must include any economic damage that would be recognized in an ordinary tort suit." The second case, *Wright v. No Skiter Inc.*, 774 F.2d 422, 426 (10th Cir. 1985), does not even address the issue of what constitutes injury to property under Section 1985, but simply relies on *Irizarry*. *Portman v. County of Santa Clara*, 995 F.2d 898, 909-10 (9th Cir. 1993), the third case, relies solely on

Irizarry and *Wright*. Thus, when traced back to its origins, the proposition that employment at will is "property" for Section 1985 is without support.

Having failed to find support in the contemporaneous enactments that use the term "property," Petitioner and *amici curiae* instead rely upon a case interpreting the term property under the antitrust laws, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). *Reiter*, which simply holds that the loss of money is injury to property within the meaning of the Clayton Act, has no relevance here. *Reiter* interprets a word used in a different and unrelated set of Congressional enactments and makes no reference to employment at will.

The body of jurisprudence interpreting the interrelated and contemporaneous set of reconstruction-era civil rights enactments establishes that employment at will is not "property." To reach a different conclusion would not only be contrary to previous holdings of this Court, it would expand the meaning of the other reconstruction-era civil rights enactments beyond all previously recognized bounds.

B. The Plain Language Of Section 1985 And Its Legislative History Do Not Authorize A Claim Based On The Termination Of At Will Employment.

There is nothing, either in the plain language of Section 1985 or its legislative history, that demonstrates

Congress intended to provide a civil remedy for the termination of at will employment. There is no reference in the statute to termination of employment or any other type of employment related action.

This is in contradistinction from the Civil Rights Act of 1870 (also known as the Enforcement Act) enacted less than a year before the parent of Section 1985.[7] Section 5 of the Enforcement Act provided:

> That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of *depriving such person of employment or occupation*, or of ejecting such person from rented house, lands, or other *property*, or by threats of refusing to renew leases or *contracts for labor*, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor . . ..

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[7] The voting rights provisions of the Enforcement Act were repealed in 1894. The criminal prohibition against deprivation of civil rights, with modifications, remains as 18 U.S.C. § 241.

Enforcement Act, ch. 114, 16 Stat. 140, 141 (1870) (repealed 1894) (emphasis added).

It is thus evident that the reconstruction-era Congress, when it so intended, specifically protected employment occupation and contracts of labor, in addition to property. The reconstruction-era Congress, however, chose not to include employment, occupation or contracts of labor in Section 1985.[8]

The legislative history of Section 1985 supports this analysis. The legislative history does not contain any reference to the termination of employment being prohibited under the statute. While the Congressional debate did not focus on Congress' intent regarding injury to "person or property," the debates provide an indication of members' concerns. Congress was alarmed at the violence sweeping the south. They often referred to the situation with the Klan as a "war" and strived for the "establishment of peace and order." Cong. Globe, 42d Cong., 1st Sess. 339 (1871) (statement of Rep. Kelley).

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[8] Congress on numerous occasions specifically has provided remedies for retaliation in the terms and conditions of employment for exercising rights provided for by law. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-3(a); Energy Reorganization Act, 42 U.S.C. § 5851(a); False Claims Act, 31 U.S.C. § 3730(h); Age Discrimination in Employment Act, 29 U.S.C. § 623(d); ERISA, 29 U.S.C. § 1140; Labor-Managements Relations Act, 29 U.S.C. § 158(a)(4); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); Federal Employers Liability Act, 45 U.S.C. § 60.

Representative Stoughton recounted the testimony of one man during Congressional hearings who reported that people would not testify against the Klan in court because they were afraid their lives would be placed in danger. Cong. Globe, *supra*, at 320-21. The man testified that on one occasion the Klan came to his house and shot at him through his front door when he would not come outside. *Id.*

During the debates, members of Congress often referred to the types of injuries caused by the Klan: "murdered, brutally beaten, or driven away at the peril of their lives" *id.* at 321 (statement of Rep. Stoughton); "scourgings, burnings, and butcheries" *id.* at 516 (statement of Rep. Shellabarger); "by means of burning, stealing, whipping [and] murder" *id.* at 517 (statement of Rep. Shellabarger).

The Civil Rights Act of 1871 was introduced and passed five years after the organization of the Klan. *See McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980). During that five year period, the Klan violently resisted reconstruction and frequently attacked federal officials, African-Americans, and Union sympathizers. *See id.* The Southern States' governments seemed unable or unwilling to respond to the Klan's violence. *See Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 350 (5th Cir. June 1981) (enbanc) (Johnson, J., dissenting), *cert. denied*, 454 U.S. 1110 (1981), *overruled in part on other grounds by Kush v. Rutledge*, 460 U.S. 719 (1983). As a result, President Grant sent a message to Congress asking for authority to

control the "condition of affairs . . . rendering life and property insecure." Cong. Globe, *supra*, at 236.

Absent in the legislative history is any discussion of employment, at will or otherwise, in regard to Section 1985. Indeed, neither Petitioner nor any of the *amici curiae* cite to any legislative history that reflects a Congressional intent to prohibit the termination of at will employment. Thus, neither the plain language of Section 1985 nor its legislative history provide any support for Petitioner's contention that the statute prohibits termination of at will employment.

C. That Employment At Will Is Not Property Is Consistent With Property And Employment Rights At The Time Of Passage Of The Civil Rights Act Of 1871.

The overarching consideration in determining whether a property interest exists is whether the interest is protected and enforceable by law. As Judge Learned Hand stated, "[o]rdinarily a person has 'property' in a thing if he has untrammelled freedom to use it as he wills and may invoke legal sanctions to protect that freedom." *Helvering v. Elias*, 122 F.2d 171, 172 (2d Cir. 1941). The concept that a party must have a legal right to enforce a property interest is not a recent phenomena. It clearly predates the passage of the Civil Rights Act of 1871. In an 1820 decision, New York's Supreme Court recognized that "*[p]roperty* is defined to be . . . that right which one hath . . . *which no way depend on another man's courtesy.*"

Jackson v. Housel, 17 Johns. 280, 283 (N.Y. Sup. Ct. 1820) (second emphasis added); *see also, Stief v. Hart*, 1 N.Y. 20, 24 (1847) (same definition of "property" quoting Jacobs Law Dictionary).

The appellate court of Maine, in an 1841 decision, rejected a plaintiff's claim for the lost wages of the plaintiff's son, finding that the future earnings of the son were not property. *Reed v. Inhabitants of Belfast*, 20 Me. 246 (1841). The statute at issue in *Reed* provided for recovery of damages:

> [i]f any person shall lose a limb, break a bone, or receive any other injury in his person, or in his horse, team or *other property*.

Id. at 248. The Court examined the legislative intent of the statute and held:

> The fruits which we may expect to reap from the future earnings of our children can, in nowise be considered as present property, liable to be damaged or injured; or at any rate not such as could be considered as having been in view by the legislature, when they speak of injuries to the property of any one. We must suppose that the legislature used the word property in its obvious and ordinary sense, and are not at liberty to seek

> for a hidden, abstruse or far fetched construction of it.

Id. at 249-50. *Reed* is instructive both in its exploration of the meaning of property and its resistance to imposing unintended interpretations of legislation.

At the time of the passage of the Civil Rights Act of 1871, not only were there no limitations on an employer's right to enter into and terminate employment relationships,[9] Congress and the courts were vigilant in protecting the rights of both employers and employees to freely enter into and terminate employment relationships. In *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion),[10] then Associate Justice Rehnquist provided a synopsis of the development of federal civil service protections:

> For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might

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[9] At will employment is by definition only applicable when there is not an enforceable employment contract. Thus, an employee always had the ability to bring suit on a contract.

[10] A federal employee's property interest in employment under the Fifth Amendment Due Process Clause is coextensive with that of a state employee bringing a 42 U.S.C. § 1983 claim under the Due Process Clause of the Fourteenth Amendment. *Arnett*, 416 U.S. at 151; *Paul*, 424 U.S. at 702 n.3.

> appeal to the responsible executive hiring officer. Following the Civil War, grass -roots sentiment for "Civil Service reform" began to grow, and it was apparently brought to a head by the assassination of President James A. Garfield on July 2, 1881. . . . Responding to public demand for reform . . . Congress in January 1883 enacted the Pendleton Act.
>
> While the Pendleton Act is regarded as the keystone in the present arch of Civil Service legislation, by present-day standards, it was quite limited in its application . . .. Its only provision with respect to separation was to prohibit removal for the failure of an employee in the classified service to contribute to a political fund or to render any political service.
>
> * * *
>
> Prior to the enactment of [the Lloyd-La Follette Act] in 1912, there was no statutory inhibition on the authority of the Government to discharge a federal employee, and an employee could be discharged with or without cause . . ..[11]

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[11] The only exception to the at will employment of federal employees prior to 1912 was for conduct protected under the First Amendment. As discussed *infra* at 40-41, this exception is limited to government employees and arises from fundamental rights protected by the First Amendment. Petitioner is not alleging state action and First Amendment limitations are immaterial.

416 U.S. at 148-49, 158.

This virtually unlimited right to discharge federal employees for any reason mirrored the right of private employers to terminate employment relations. This unrestricted freedom in employment decisions at the time of the passage of the Civil Rights Act of 1871 is reflected in the Court's decision in *Adair v. United States*, 208 U.S. 161 (1908).[12] In *Adair*, an agent of an employer was criminally prosecuted for terminating the employment of an individual in retaliation for the individual's membership in a labor organization. *Id.* at 170. This Court found the statute under which the employer's agent was prosecuted unconstitutional and held:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

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[12] *Adair* was subsequently limited by *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and other decisions. However, for purposes of determining Congressional intent when passing the Civil Rights Act of 1871, *Adair* is instructive in employment rights in the latter half of the 19th century.

* * *

> [I]t is not within the functions of government – at least, in the absence of contract between the parties – to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.
>
> * * *
>
> In absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.

Id. at 173-76.

Adair reflects employment rights at the time of the passage of the Civil Rights Act of 1871 and is consistent with the legislative history of the statute. As *amicus curiae* notes, there was concern over the abilities of northerners to come south and enter into business. (Brief of *Amicus Curiae* National Whistleblower Center at 16.) Consistent with *Adair* and the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the concern of Congress was the ability of parties to freely enter into and terminate business relationships.[13] Indeed, at the time of enactment of the Civil Rights Act of 1871, Congress was more likely

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[13] *Amicus curiae* National Whistleblower Center takes quotations out of context from the *Slaughter-House Cases* and misstates the significance of the quotations in claiming that the Court recognized a property interest in continued employment. (Brief of *Amicus Curiae* National Whistleblower Center at 12.) Contrary to *amicus curiae's* assertion, the Justices in the *Slaughter-House Cases* were employing reasoning identical to that of the Court in *Adair*. In the *Slaughter-House Cases*, reference was made to the right of employers and employees to both enter into and terminate employment relations at will. The quotations by *amicus curiae* relate to the right of an employee to enter into and terminate an employment relationship at will. The portions of the decision quoted are focused on the prohibition against compelling an employer or employee to enter into or remain in an undesired employment relationship. One thing that the various opinions in the *Slaughter-House Cases* do not state is that an employee has any right to legally compel continued employment against the will of the employer. The cases do not establish any right to compel continued employment against the wishes of either employer or employee and, in fact, hold just the opposite. Accordingly, both *Slaughter-House Cases* and *Adair* affirmatively established that there was no right to compel continued employment at the time of the passage of the Civil Rights Act of 1871.

to have intended it to be a violation of a person's civil rights to compel an employer or employee to continue in an employment relationship against their will.

D. Petitioner Has No Property Interest In His At Will Employment Under Georgia Law.

Petitioner concedes he was an at will employee under Georgia law. (Petitioner's Brief at 7). Under Georgia law it is well established:

> [W]here an employee's employment is terminable at will, an employer with or without cause and regardless of its motives, may discharge the employee without liability.

Runyon v. Economics Lab., Inc., 248 S.E.2d 44, 46 (Ga. App. 1978); *see also, Georgia Power Co. v. Busbin*, 250 S.E.2d 442 (Ga. 1978). Accordingly, Petitioner may not assert a retaliatory discharge claim against his employer under Georgia law.

In *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051 (5th Cir. Unit A July 1981), the plaintiff claimed that his employment was terminated in retaliation for his testimony in a federal lawsuit against his employer. In reversing the judgment for the plaintiff, the Former Fifth Circuit held:

> The Georgia courts have uniformly followed the at will rule, holding that an employee at will has no cause of action, whether characterized as sounding in tort or in contract, against its employer for an alleged wrongful discharge.

Id. at 1054. Similarly, the plaintiff in *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (5th Cir. Unit B Sept. 1981), alleged that his employment was terminated in retaliation for investigating possible illegal activities by his employer. The court affirmed the judgment for the defendants and rejected the plaintiff's request to create a public policy exception under Georgia law:

> Nevertheless, *plaintiff urges this court to find an exception to this rule since the reason for his termination was that he was about to uncover criminal activities. There is no room for this exception in Georgia* as this rule is statutory and the statute, Code § 66-101, does not encompass the exception.

Id. at 1031 (quoting *Goodroe v. Georgia Power Co.*, 251 S.E.2d 51, 51-52 (Ga. App. 1978)). The court also rejected the plaintiff's conspiracy claim because "the defendant corporation and its supervisory employees cannot 'conspire to do that which they legally were entitled to do.'" *Id.* at 1032 (citing *Georgia Power Co. v. Busbin*, 250 S.E.2d 442, 444 (Ga. 1978)).

Following this Court's holdings in *Roth* and *Bishop*, the Eleventh Circuit has held that at will employees do not have a property interest in their employment under Georgia law. In *Wofford v. Glynn Brunswick Mem'l Hosp.*, 864 F.2d 117 (11th Cir. 1989), the court affirmed the judgment for the defendant employer and held:

> It follows that, in Georgia, an at will employee typically does not have a reasonable expectation of continued employment sufficient to form a protectable property interest.

Id. at 119; *see also, Brett v. Jefferson County, Georgia*, 123 F.3d 1429, 1434 (11th Cir. 1997) ("public employee generally has no protected property interest"); *Nolin v. Douglas County*, 903 F.2d 1546, 1553 (11th Cir. 1990) ("no evidence from which a jury could conclude that [plaintiff] possessed a property interest in continued employment"), *overruled in part on other grounds by McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).[14]

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[14] For purposes of Georgia law, it is meaningless whether Petitioner attempts to couch his claim as an injury to "person" or "property." No matter how characterized, Petitioner has no claim for wrongful termination under Georgia law against his employer. *See Phillips*, 651 F.2d at 1054 ("employee at will has no cause of action, whether characterized as sounding in tort or in contract, against his employer for an alleged wrongful discharge").

E. The First Amendment Cases Provide No Support For Petitioner

The reliance of *amici curiae* on *Rankin v. McPherson*, 483 U.S. 378 (1987), *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996), is misguided. Respondents have not suggested that the termination of employment is not actionable if the decision is made in violation of a federal law prohibiting such. The law at issue here, though, does not contain such a prohibition.

The three cited decisions are based on First Amendment claims. The First Amendment decisions are distinguishable from this case for several reasons. The cases fall under the "liberty" protection of due process clause, not "property." *See Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925) ("freedom of speech . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause"); *Whitney v. People of State of California*, 274 U.S. 357, 373 (1927) (Brandeis, J. concurring) ("fundamental rights comprised within the term liberty are protected . . . [and] the right of free speech . . .[is] a fundamental right[]"). *Roth* and *Bishop*, on the other hand, determined that at will employment was not "property" under the Due Process Clause.

In addition, the First Amendment cases focus on whether the state has infringed upon the parties'

constitutional right, i.e., freedom of speech. The overriding concern in the First Amendment cases is to stop "[s]uch interference with constitutional rights." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Finally, the First Amendment cases are brought under Section 1983 which provides that the "party injured" shall have an action "for redress."

Although enacted as part of the Civil Rights Act of 1871, Section 1983 does not limit recovery to injuries to "person or property" as Congress did in Section 1985. The lack of the restrictive phrase "person or property" allows for recovery of a greater range of injuries. Thus the First Amendment cases do not contain any holdings that expand the limits of property as found by the Court in *Roth* and *Bishop*.

III. PETITIONER AND *AMICI CURIAE* MISSTATE THE SIGNIFICANCE OF PETITIONER NOT BEING ABLE TO BRING A CLAIM UNDER SECTION 1985 BECAUSE PETITIONER AND THE FEDERAL COURT SYSTEM ARE ADEQUATELY PROTECTED BY OTHER STATUTES.

Petitioner and *amici curiae* contend that if Petitioner is unable to bring a claim under Section 1985, then employers will be allowed to intimidate and retaliate against employees without fear of recourse. These predictions of unrestricted intimidation and retaliation

activities by employers is unfounded and a gross exaggeration. At will employees that actually are discharged because of their testimony in a federal court proceeding have existing civil remedies. Moreover, there are criminal statutes employers will violate by engaging in such activities.

As evidence of these other remedies, in his Complaint Petitioner brought tortious interference with employment relations and Georgia RICO claims against Respondents. Both of the state law claims were based on the alleged retaliatory termination of Petitioner's employment for his testifying in a federal court proceeding. (App. 12-14, ¶¶ 26 and 34.) The Georgia courts determined on summary judgment that the state law claims asserted by Petitioner are unsupported by the evidence. (App. 53-60.) In a strange twist, Petitioner contends that because his state law claims were unsuccessful, he now needs a remedy under Section 1985. (Petitioner's Brief at 27.)

In addition, Petitioner could possibly have brought an action against his employer under the anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h). That statute prohibits an employer from discharging an employee for undertaking lawful acts in furtherance of an action filed or to be filed under the False Claims Act. *See, e.g., Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1080 (1997). For whatever reason, Petitioner chose not to do so.

Moreover, the greater deterrence to employers against intimidating or retaliating against employees is criminal statutes prohibiting obstruction of justice. *See, e.g.*, 18 U.S.C. § 1503 (Obstruction of justice); 18 U.S.C. § 1505 (Obstruction of proceedings before departments, agencies and committees); 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant); *see also*, 18 U.S.C. § 1514 (Civil action to restrain harassment of a victim or witness). Employers face significant incarceration and fines under the criminal statutes.[15] The criminal statutes negate any contention that employers will engage in acts of intimidation and retaliation unless at will employees are allowed to assert claims under Section 1985.

IV. PETITIONER'S CLAIM WAS PROPERLY DISMISSED ON ALTERNATIVE BASES.

A. Petitioner Does Not Prevail Based Upon The Circuit Court Opinions Upon Which He Relies.

Petitioner relies on the Ninth Circuit decision in *Portman v. County of Santa Clara*, 995 F.2d 898 (9th Cir.

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[15] In addition, as Petitioner asserted in his Georgia RICO claim, 18 U.S.C. § 1503 is a predicate act under both the federal RICO statute and the Georgia RICO statute. Accordingly, although no civil claims are allowed directly under the statute, *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123 (10th Cir. 1953), Petitioner had a civil cause of action (ultimately unsuccessful) based on the alleged obstruction of justice.

1993). (Petitioner's Brief at 21-22.) However, Petitioner's claim also would have been dismissed under the Ninth Circuit's interpretation of Section 1985. This is because the Ninth Circuit requires that there be injury to a *party* in a federal court proceeding.

Although not at issue in *Portman*, the Ninth Circuit made the requirement of injury to a party in an underlying action absolutely clear in *David v. United States*, 820 F.2d 1038 (9th Cir. 1987). In *David*, the Section 1985 plaintiff claimed she had been discharged from her employment because of her acting as a witness in a separate federal court proceeding (to which the Section 1985 plaintiff was *not* a party). The Ninth Circuit held:

> David [the Section 1985 plaintiff] has not alleged how *she* has been injured by her testimony in *Parodi* [the separate federal court proceeding] or her failure to appear in court. Allegations of witness intimidation under § 1985(2) will not suffice for a cause of action unless it can be shown the *litigant* was hampered in being able to present an effective case. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under § 1985(2).

Id. at 1040 (citation omitted).

In *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983), it also was specifically noted that the "[p]laintiffs have proved that they were denied reemployment because they previously had instituted legal actions to vindicate their federal rights." *See also, Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1180 (7th Cir. 1989) ("Congress intended to provide a damage-remedy only for litigants . . .. Otherwise the term 'witness' would have been contained in those remedial provisions."); *cf. Rode v. Dellarciprete*, 845 F.2d 1195, 1206-07 (3d Cir. 1988).

The Ninth Circuit also has held that it is not enough that the Section 1985 plaintiff at one time was a party to a prior federal proceeding if the federal claims were dismissed. On remand from *Kush v. Rutledge*, the Ninth Circuit in *Rutledge v. Arizona Board of Regents*, 859 F.2d 732, 735-36 (9th Cir. 1988) found that because the federal court proceeding had been dismissed and was barred, the plaintiff could not show the alleged conspiracy affected his ability to present a case and thus could show no injury.

Unlike the plaintiffs in *Irizarry, Rutledge* and *Portman*, Petitioner was a potential witness, not a party, in the separate federal litigation. Because he was not a party to the separate federal proceeding, Petitioner's ability to present an effective case in federal court was unaffected, and he therefore has suffered no "actual injury."

Moreover, there is no allegation that Petitioner was in any way hindered or prevented from cooperating with the government and testifying. Thus, Petitioner was not

injured in his ability to testify. *Rylewicz*, 888 F.2d at 1181 ("no allegation . . . hampered from testifying 'freely, fully, and truthfully,' . . .. Plaintiffs have simply not pointed to an injury . . . within the scope of Section 1985"). Since it is the interest in being able to litigate a party's case fully in the federal courts that constitutes the protected federal interest under *Irizarry* and *Portman*, only parties hampered in their ability to litigate federal actions have standing under Section 1985. Because Petitioner had no such federal interest implicated and was not injured, it was proper to dismiss his Section 1985 claim.

B. Petitioner Failed To Plead Force, Intimidation Or Threat Sufficiently.

Under Section 1985(2), two or more persons must conspire to deter testimony by use of "force, intimidation or threat." As previously discussed, when the Civil Rights Act was passed in 1871, Congress intended that the statute inhibit members of the Ku Klux Klan from using lynchings, whippings and other acts of violence to obtain political control in the south. Paragraphs 18, 19, and 20 of Petitioner's Complaint, which purport to set out the force, intimidation or threat, focuses solely on the termination of Petitioner's employment. (App. 10-11, ¶¶ 18-20.)

The Eleventh Circuit held in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), that such allegations are insufficient as a matter of law to establish "force, intimidation or threat." In *Morast*, the plaintiff's employment was terminated allegedly for the plaintiff's

cooperation with federal regulators. In *Morast*, the plaintiff alleged the defendants acted angry, upset and vindictive toward plaintiff, questioned the plaintiff about press leaks, excluded plaintiff from meetings, and decreased his work load. *Morast v. Lance*, 631 F. Supp. 474, 479 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987). As one of its bases for granting defendants' motion to dismiss, the district court stated: "Plaintiff's complaint is essentially void of the factual allegations necessary to support a claim under section 1985(2)." *Id.*

The Eleventh Circuit, in affirming the district court's grant of the motion to dismiss on this particular ground, stated:

> Morast has not alleged that the defendants conspired to stop him from attending or testifying at the hearing by "force, intimidation, or threat." Morast contends only that defendants retaliated against him with anger and vindictiveness, extensive questioning regarding leaks to the press, exclusion from board meetings, and a decreased workload.[4]

[4] The remainder of Morast's list of "retaliations" are conclusory in nature and are not specific examples of acts to deter testimony or

> attendance by "force, intimidation, or threat."

Morast, 807 F.2d at 930.

The Eighth Circuit addressed the requirement of "force, intimidation, or threat" in *Gill v. Farm Bureau Life Ins. Co. of Missouri*, 906 F.2d 1265 (8th Cir. 1990). In *Gill*, an insurance agent in an at will contractual relationship had the agency relationship canceled. Finding the allegations in the complaint insufficient, the Eighth Circuit stated:

> Viewed in the light of its origins, as a reaction against the "murders, whippings, and beatings committed by rogues in white sheets in the post bellum south," the Ku Klux Klan Act obviously meant to its framers, when it spoke of "force, intimidation, or threat" something much more serious and terrifying than a written notice of cancellation of a contract designating [plaintiff] as an agent to sell Farm Bureau Insurance.

Id. at 1269.

In another decision addressing what satisfies the "force, intimidation, or threat" requirement, Judge Meskill of the Second Circuit strenuously argued that "force, intimidation or threat" should "require evidence of

physical force, threats of violence or similarly malevolent acts." *Keating v. Carey*, 706 F.2d 377, 392 (2d Cir. 1983) (Meskill, J., dissenting). Accordingly, Petitioner has failed to plead sufficiently "force, intimidation or threat," and his Complaint properly was dismissed.

CONCLUSION

For the reasons given above, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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